UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ARTHUR L. MICCIO, SR.,	:	
Plaintiff,	:	Civ. No. 91-5552 (GEB)
v.	:	
NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, et al.,	:	**MEMORANDUM AND ORDER**
Defendants.	:	

BROWN, District Judge

This matter comes before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. Also before the Court is plaintiff's request[1] that this Court reconsider its March 22, 1993 affirmance of the magistrate judge's denial of plaintiff's motion to file a third amended complaint for failure to comply with General Rule 12(H). For the reasons set forth in this Memorandum and Order, issued pursuant to Fed. R. Civ. P. 78, the Court will: (1) deny plaintiff's request for reconsideration pursuant to General Rule 12(I): (2) deny defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6); and (3) grant defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56.

[1]As discussed *infra*, plaintiff failed to file a formal motion for reconsideration as prescribed by General Rule 12(I) of the Rules of this Court but, nevertheless, the Court will address plaintiff's request. *See infra* part II.A.

I. BACKGROUND

A. Factual Background

Plaintiff *pro se* Arthur L. Miccio, Sr. has been in the employ of defendant New Jersey Department of Community Affairs (the "NJDCA") or its predecessor for about twenty years.[2] Prior to 1986, plaintiff worked in various capacities within the bureaucratic entity including Supervisor to the then existing Construction Plans Review Section.

In 1986, in response to the explosive growth in the construction industry in the mid-1980's, and a steadily increasing backlog of construction plans submitted for state approval, the NJDCA reorganized the organizational structure of the Bureau of Construction Code Enforcement. Plaintiff's department was located within this Bureau. As part of the reorganization, the Construction Plans Review Section was reorganized and resituated within the newly created Bureau of Construction Project Review. Arthur Lange, one of three Assistant Bureau Chiefs of the Bureau of Construction Code Enforcement, was elevated to head the newly created Bureau as "Bureau Chief." Concomitantly, plaintiff was made "Supervisor" of the new Casino and Special Projects Review Section and received an annual salary increase of $2095. Displeased with Lange's promotion and the reclassification of his position, plaintiff sought administrative review through the newly-created Department of Personnel.[3] Plaintiff asserted that he was entitled to Lange's "Bureau Chief" position and that his new posi-

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[2]Plaintiff became employed with the State of New Jersey in February of 1973. Initially, plaintiff worked in the Department of Communicate Affairs—Division of Housing, which, prior to the commencement of this action, was replaced by the Division of Codes and Standards—Construction Review Section. *See* Affidavit of Arthur L. Miccio dated March 19, 1993, at §§2-4 [hereinafter Miccio Aff.].

[3]The Department of Personnel replaced the Department of Civil Service in 1986.

tion as Supervisor of the Casino and Special Projects Review Section was improperly classified.

At the behest of the Department of Personnel, a hearing was held before an independent Classification Reviewer who, on January 6, 1991, issued a Report and Recommendation rejecting plaintiff's claim that he was entitled to Lange's position. *See* Hearing Officer's Report (attached to Defs.' Br. at Exhibit B). The independent Classification Reviewer further suggested that plaintiff's position be classified as "Supervisor, Construction Plans Approval Section." *See id.* at Ra14. Moreover, in his Report and Recommendation, the independent Classification Reviewer concluded that (1) plaintiff did not possess the necessary objective qualifications for the Bureau Chief position—i.e., either an architect's or an engineering license or a college degree in one of those disciplines, and (2) Lange was eminently more qualified for the position. *See generally id.*

The matter was then reviewed by the Commissioner of Personnel who, on May 6, 1991, adopted the independent Classification Reviewer's Report and Recommendation as the final administrative decision of the Department of Personnel. *See* Final Administrative Action of the Commissioner of Personnel—Classification Appeal, issued May 6, 1991 (attached to Defs.' Br. at Exhibit C). Thereafter, on December 9, 1992, the New Jersey Superior Court—Appellate Division upheld the Commissioner's decision. *See Miccio v. NJDCA*, No. A-5577-90T1 (App. Div. 1992) (attached to Defs.' Br. at Exhibit D).

In the interim, on July 2, 1991, plaintiff, at or about the age of 60, commenced this action against the NJDCA and two if its executive officers, alleging age discrimination.

B. Procedural Background

This Court adequately set forth the procedural background of this action in its Memorandum and Order

dated March 22, 1993. Therefore, I find it unnecessary to reiterate that portion of the Court's decision here.

II. DISCUSSION

A. Plaintiff's Request for Reconsideration

In a letter dated March 30, 1993, plaintiff requested that this Court reconsider its March 22, 1993 affirmance of the magistrate judge's denial of plaintiff's motion to file a third amended complaint to add a conspiracy claim for failure to comply with General Rule 12(H). Letter from Arthur L. Miccio, plaintiff *pro se,* to Garrett E. Brown, Jr., U.S.D.J. (March 30, 1993). Despite the informal nature of plaintiff's request, the Court will, nevertheless, address the issue.

General Rule 12(I) provides:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. No oral argument shall be heard unless the Court grants the motion and specifically directs that the matter shall be reargued orally.

General Rule 12(I). Relief under this Rule is to be granted "very sparingly." *Maldonado v. Lucca,* 636 F. Supp. 621, 630 (D.N.J. 1986). Moreover, the Court will grant a motion for reconsideration only if the movant establishes that the Court overlooked matters or decisions that, if considered, "might reasonably have altered the result reached." *Starr v. JCI Data Processing, Inc.,* 767 F. Supp. 633, 635 (D.N.J. 1991) (internal quotation omitted). The Rule's use of the term "overlooked" has two implications. First, the movant must already have presented the matter to the Court, rather than attempt to raise new matters. *SPIRG v. Monsanto Co.,* 727 F.

Supp. 876, 878 (D.N.J.), aff'd, 891 F.2d 283 (3d Cir. 1989); *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988). Second, the Court must not have addressed the matter. *Carteret Sav. Bank, F.A. v. Shushan*, 721 F. Supp. 705, 706 (D.N.J. 1989); *Florham Park Chevron*, 680 F. Supp. at 163.

In the instant case, although plaintiff has already presented this matter to the Court, thereby satisfying the first prong of the two-part inquiry, plaintiff falls short of fulfilling the second in that the Court has already addressed the issues raised by plaintiff. Since plaintiff is merely raising his disagreement with the Court's initial decision, I find no merit to his Rule 12(I) request. Accordingly, plaintiff's request that this Court reconsider its March 22, 1993 affirmance of the magistrate judge's denial of plaintiff's motion to file a third amended complaint for failure to comply with General Rule 12(H) is denied.

B. Defendant's Motion to Dismiss

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

Commensurate with the United States Supreme Court's decision in *Haines v. Kerner*, 404 U.S. 519 (1972), this Court cannot say with assurance that after reviewing the allegations contained in plaintiff's *pro se* complaint—which must be held to less stringent pleading standards than those drafted by a trained attorney—that "it appears 'beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 520-21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Furthermore, defendants' summary judgment motion is based upon the full factual record presented to this Court and is, therefore, the more appropriate context within which to decide whether plaintiff's claims should be dismissed. Accordingly, the Court will deny defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

C. Defendants' Motion for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 474 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Plaintiff alleges that he was discriminated against

and effectively demoted because of his age.[4] Under the ADEA, it is unlawful for an employer to demote, discharge, or otherwise discriminate against an employee on the basis of that individual's age. 29 U.S.C. §623(1) (1988). In order to recover under the ADEA, however, the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that age was "a determinative factor" in the employer's decision. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); *Berndt v. Kaiser Aluminum & Chem Sales, Inc.*, 789 F.2d 253, 256 (3d Cir. 1986); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). A plaintiff need not prove that age was the employer's exclusive or sole consideration, but he must demonstrate that age made a difference in the decision. *Chipollini*, 814 F.2d at 897; *Berndt*, 789 F.2d at 256; *Duffy*, 738 F.2d at 1395.

The allocation of proof under the ADEA is well settled. *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992). Initially, the plaintiff bears the burden of establishing a *prima facie* case of unlawful discrimination. *Id.* If the plaintiff succeeds, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employer's decision. *Id.* (citations omitted). If the employer articulates such a reason, the burden shifts back to the plaintiff to de-

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[4]Plaintiff maintains that although his salary was increased from $42,189 to $44,284 after the restructuring, he was effectively demoted because his previous salary was based on a 35 hour work week while his current salary is based upon a 40 hour work week, thereby decreasing his hourly wage by $1.89. Miccio Aff. at §19. This Court finds this argument meritless in light of plaintiff's assertions that for three years prior to the reorganization, plaintiff was forced to work nights, weekends, and through lunch without compensation due to staffing problems. *See id.* at §12. Therefore, the Court will address plaintiff's ADEA claim solely in the context of plaintiff's allegation that the defendants' decision to elevate Lange instead of plaintiff to the position of Bureau Chief was due in part to plaintiff's advancing age.

monstrate that the employer's proffered reason is pretextual or that its decision was more likely based on some discriminatory reason. *Id.* (citations omitted).

1. Plaintiff's *Prima Facie* Case

Defendants first argue that plaintiff has failed to sustain his burden of establishing a *prima facie* case of age discrimination. As the Third Circuit has repeatedly held, in the absence of direct evidence, a plaintiff may establish a *prima facie* case of age discrimination by demonstrating by a preponderance of the evidence that (1) plaintiff is a member of the protected class; (2) plaintiff was qualified for the position that he sought but did not receive; and (3) the promotion plaintiff sought was given to a person sufficiently younger to permit an inference of age discrimination. *See id.; Turner v. Schering-Plough Corp.*, 901 F.2d 335, 342 (3d Cir. 1990); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 53 (3d Cir.), *cert. denied*, 496 U.S. 906 (1990); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1212 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *Chipollini*, 814 F.2d at 897; *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 654 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).

With respect to plaintiff's status, he clearly belongs to the class of individuals protected under the ADEA in that the ADEA protects individuals between the ages of 40 and less than 70. *See* 29 U.S.C. §631(a) (1988). Plaintiff was approximately 56 years of age when he was passed up for the position of Bureau Chief in 1986. Additionally, plaintiff also easily satisfies the third requirement in that Arthur Lange, the individual who received the promotion plaintiff sought, is about 11 years younger than plaintiff.

Regarding the second element, however, defendants argue that plaintiff has failed to demonstrate that either his credentials or his level of performance qualified him for the position of Bureau Chief. In an attempt to prove that he was in fact qualified for the promotion, plaintiff

avers that he: (1) possessed a high level of knowledge and experience in the field; (2) was highly regarded among his peers; and (3) outscored several licensed engineers and architects on the Civil Service examination. *See* Miccio Aff. at §§6-8, 15, 20-22. However, plaintiff's subjective belief that he was more than qualified for the job is not sufficient to preclude the grant of summary judgment. *Allen v. Denver Public School Bd.*, 928 F.2d 978, 985 (10th Cir. 1991). Furthermore, plaintiff admits that he neither possesses an architect's or an engineering license, nor has he earned a college degree in one of those disciplines—a prerequisite for the position of Bureau Chief. *See id.* at §6; Affidavit of William M. Connolly dated February 18, 1993, at §9 [hereinafter Connolly Aff.]. On the other hand, Lange is a licensed architect. *See id.* It is also uncontradicted that while plaintiff was serving as the Supervisor of the Construction Plans Review Section, plaintiff failed to meet certain performance standards in that his backlog of construction plans submitted for state approval increased to 700. *See id.* at §6.

Therefore, plaintiff has failed to establish an essential element of his *prima facie* case of unlawful discrimination; namely, that he was qualified for the position that he sought but did not receive. Furthermore, as will be dicussed *infra,* plaintiff has also failed to sustain his burden of establishing that the defendants' proffered legitimate reasons for promoting someone other than plaintiff are pretext for discrimination. *See infra* part II.C.3. Accordingly, this Court will grant defendant's motion for summary judgment.

2. Defendants' Nondiscriminatory Reasons

Assuming, *arguendo,* that plaintiff had established a *prima facie* case, the burden would then shift to the defendants to articulate a legitimate, nondiscriminatory reason for their decision to promote someone other than plaintiff. *Gray,* 957 F.2d at 1078; *see also Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254-55

(1981). A defendant need not *prove* a legitimate, nondiscriminatory reason, but merely articulate one. *Id.* The undisputed facts of the record show that the defendants have met this burden. Defendants maintain that the following factors were the basis for promoting Lange instead of plaintiff to the position of Bureau Chief: (1) plaintiff does not possess the necessary objective qualifications for the Bureau Chief position—i.e., either an architect's or an engineering license or a college degree in one of those disciplines; (2) Lange is a licensed architect; (3) plaintiff failed to meet certain performance standards in the reduction of his backlog; (4) Lange was plaintiff's supervisor prior to the bureaucratic reorganization and, as such, had much broader and higher level duties and responsibilities than plaintiff; and (5) Lange possessed stronger management skills, oral and written communication skills, and was more effective in supervising professional personnel than plaintiff. *See* Connolly Aff. at §§6-14. Thus, the defendants have articulated a legitimate, nondiscriminatory reason for promoting someone other than plaintiff and have thus met their burden.

3. Plaintiff's Evidence of Pretext

Having articulated a legitimate, nondiscriminatory reason for elevating someone other than plaintiff to the position of Bureau Chief, the burden shifts back to the plaintiff to demonstrate that the defendants' proffered reasons are pretextual or that their decision was more likely based on some discriminatory reason. *Gray,* 957 F.2d at 1078 (citations omitted). Plaintiff's burden at trial would be to prove by a preponderance of the evidence that the proffered reasons are simply pretext. *Bruno v. W.B. Saunders Co.,* 882 F.2d 760, 764 (3d Cir. 1989), *cert. denied,* 493 U.S. 1062 (1990); *Sorba v. Pennsylvania Drilling Co.,* 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied,* 484 U.S. 1019 (1988). For purposes of denying summary judgment, however, plaintiff need not actually carry this burden. *Siegel,* 894 F.2d at 53.

Instead, the evidence must, at a minimum, create a genuine issue of material fact as to defendants' proffered reasons. *Id.* Moreover, only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" may the court enter summary judgment. *Chipollini,* 814 F.2d at 896. In other words, in order to defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory reason, "a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." *Sorba,* 821 F.2d at 205. This, plaintiff has failed to do.

Plaintiff asserts that he genuinely feels that he was more qualified than Lange for the position and that the defendants conspired[5] to discriminate against him because (1) he is not a licensed architect, and (2) he was older than Lange. *See* Miccio Aff. at §§14-22. These claims, however, do little to further plaintiff's cause. Moreover, merely reciting that age was the reason for the decision does not make it so. *Billet v. Cigna Corp.,* 940 F.2d 812 (3d Cir. 1991) (citing *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985) (conclusory allegations of discrimination are insufficient to satisfy the requirements of Fed. R. Civ. P. 56(e))). As the Third Circuit has held:

> [P]laintiff cannot rely soley on a potential finding that the defendant's explanation is im-

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[5]It is worth noting that plaintiff, despite devoting an inordinate amount of time in his opposition brief accusing the defendants of conspiring to discriminate against him on the basis of his age, did not properly amend his complaint to add a conspiracy claim. *See* Order dated January 4, 1993 (filed by Magistrate Judge John J. Hughes); see also Memorandum and Order dated March 22, 1993; *supra* part II.A. Accordingly, the Court will not address plaintiff's allegations of conspiracy.

> plausible. The fact that a judge or jury might disbelieve the defendant's asserted non-discriminatory reason is not enough, by itself, to preclude summary judgment. Rather the plaintiff must be able to adduce evidence, whether direct or circumstantial, from which a reasonable juror could conclude that the defendant's explanation is incredible.

Chauhan v. M. Alfieri Co., 897 F.2d 123, 128 (3d Cir. 1990). Plaintiff has failed to meet his burden with respect to this issue. Accordingly, this Court will grant defendants' motion for summary judgment.

III. CONCLUSION

For the foregoing reasons,

It is this 24th day of April 1993,

ORDERED that defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) be and is hereby DENIED; and it is

FURTHER ORDERED that defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 be and is hereby GRANTED.

Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.